"AN EFFECTIVE CANADIAN LEGAL FRAMEWORK TO MEET EMERGING THREATS TO NATIONAL SECURITY"

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Tribute to John Tait

I want you to know how honoured I am to have been asked to deliver the John Tait memorial lecture on security, terrorism and intelligence. For me, John was a mentor and a friend, just as he was for many other people in the Department of Justice and the government as a whole. John succeeded in marrying security and justice. He was committed to ensuring effective security and intelligence, within a framework of constitutional rights, based on a profound awareness of their underlying values.It is hard to believe that it has been more than three years since John passed away. His wisdom, his leadership and his accute sense of ethical government are sorely missed.

John's advice would have been invaluable to us as we faced the repercussions of the events of September 11, 2001. We would have benefited greatly from his wisdom as we go about trying to identify the strategic issues and make the strategic choices to confront the threat of transnational terrorism.

Introduction

The world recently marked the first anniversary of the terrorist attacks on the United States.One year later – much has changed. In Canada, new security measures are in place – the *Anti-terrorism Act*, a national security budget investing over $7 Billion in shoring up our capacity to prevent terrorism, and an agreement on a smart border accord with the United States.While most of the elements have been put in place to address the terrorist threat, it would be a mistake to think of this as last year's agenda – as old business. It would be a mistake because it would be based on the false assumption that having put measures in place, we can simply sit back.We need to reflect on the effectiveness of those measures, and whether the nature of the threats we face is changing in a way that requires course correction, or further action. It would be a mistake not to continue discussing our on-going response to terrorism, because, if we do not continue to think about this from a Canadian perspective, if and when a further attack occurs, we will be left to react to quick moving events, to implement policies shaped by others.

If you believe, as I do, that the dark side of globalization means that transnational terrorism is likely to be a feature of our world for years to come, it would be a mistake not to think more deeply about how a country, committed to values like democracy, the rule of law, and to an inclusive, multicultural society, integrates national security into its social order. So, I believe that even if the non-military side of the fight against terrorism leaves the front pages, we need to continue a discussion about our response to the threat of terrorism.

This is a discussion that needs to occur within civil society, in academia, in Parliament and within and between governments. It will also certainly take place in our courts. That discussion should focus on everything from the merits of pre-emptive military action to the need to think about the role of development assistance. It should focus on the robustness of our intelligence capacity and the effectiveness of our security measures. It should examine how the international framework of rules, institutions and relationships needs to evolve to confront terrorism and how we coordinate domestically among the three levels of government. Each one of these areas requires a separate speech so I would like to focus on just one part of this discussion — the role of the legal framework.

Substantive questions

The overarching question we need to address is the interrelationship between national security and civil liberties.Does our legal framework give us the means to maintain an equilibrium?

As Stephen Owen, Secretary of State for Western Economic Diversification, wrote in a recent letter to the Editor, " Democracy is a balance between security and freedom. Human security is the first human right. However, total security is prison – total freedom is anarchy. The balance is contextual, and our post-September 11 awareness of vulnerability justifies a shift. But how far? " This is a question that needs the continuing attention of those who desire both security and freedom.It should not be a surprise that there is no absolute answer to this question, since the balance point is highly contextual. What is important is that we have a legal framework that provides us with the means to assess responsibly where that balance should be.

An important element in this framework is how we assess national security interests.Context, particularly the national security context, will be relevant to interpreting the scope of the rights guaranteed by the Charter of Rights and Freedoms and to justifying limitations on those rights. Our courts have been able to distinguish the national security context from the traditional criminal law context. The very first decision rendered involving the Charter concerned unreasonable search and seizure. In *Hunter* v. *Southam*, 1984, Chief Justice Dickson stated that the requirements of section 8 of the Charter may vary where the state's interest goes beyond law enforcement, as, for instance, where state security is involved. Chief Justice Dickson's sensitivity to the national security context has been reflected in decisions over the years, culminating with this year's decision in *Suresh* v. *Canada*.Many of you are likely familiar with the *Suresh* case, where the Minister of Citizenship and Immigration sought to deport Mr. Suresh, believed to be involved in terrorist fundraising.

The Court found that Canada has a legitimate and compelling interest in combating terrorism and may take strong measures to do so. This brings me to a second principle within our legal framework which is essential to the maintenance of the balance that Stephen Owen spoke about — proportionality. It finds expression in the test that governments must meet under s. 1 of the *Charter* — to justify any governmental action that infringes *Charter* rights. The limits must be reasonable, and they must be demonstrably justified in a free and democratic society.

The onus is on the state to show that the objective is sufficiently important to justify overriding a constitutionally protected right and that the means chosen are proportional to the ends to be attained. Moreover, the Supreme Court has observed that the more deleterious the effect of a given set of measures, the more important the national security objective must be if the measure is to be justified. As my colleague Rick Mosley has pointed out, proportionality is reflected in several ways in the *Anti Terrorism Act* itself. This includes strictly defined limits on new powers; special authorization and designation requirements that incorporate direct political accountability; extensive provisions for judicial supervision and ministerial review. The Act as a whole will be subject to full parliamentary review within 3 years.

There are also specific annual reporting requirements by the Attorney General of Canada, the Solicitor General and their provincial counterparts. In addition, the powers of investigative hearings and of preventive arrest will be subject to a sunset clause after 5 years. Existing oversight mechanisms, which are already part of the law, such as civilian oversight of law enforcement, remain applicable. Within this overarching framework—there are many questions that deserve our on- going attention. I'd like to briefly discuss a few of the key ones.

First, what have we learned from history? I mention this first because I believe we have learned from our past responses to perceived threats to national security. From the passage of the *Wartime Elections Act* disenfranchising citizens of enemy-alien birth, to the Palmer raids in the United States in the 1920s when police arrested thousands of people suspected of being terrorists, to the internment of Japanese Canadians and Americans during World War II, our history teaches us that overreacting to a perceived national security threat leads to the trampling of human rights of those designated as 'others,' but ultimately weakens us all.

I believe we have taken a balanced approach in response to September 11th, and we have thus far managed to avoid the mistakes of our past. We have ensured, as well, that no one need take the government's word on it alone – Canadians can, and likely will go to court to challenge the legislation. Respect for history also enables us to learn from the experience of other countries. I am thinking in particular of the United Kingdom's erosion of the right to remain silent for all accused. What was first enacted by the United Kingdom as an extraordinary measure to combat IRA terrorism has now been entrenched in its criminal justice system for all accused. By contrast, a virtue of the *Anti-terrorism Act* is its deliberate limitation to terrorism and terrorist activities. To a substantial extent, these initiatives have been limited and not extended to ordinary law enforcement.

The lesson to be taken from the British experience is this. We need to carefully scrutinize any future proposals that might blur the distinction between investigation of threats to the security of Canada and the investigation of traditional crimes.

A second question is, does our national response to terrorism address the transnational nature of the threat? Transnational terrorism calls for a coordinated international response. So an important part of the on-going discussion must be about whether our national response appropriately reflects this and whether our international institutions are up to the task.

I would like to make three points: First, the Supreme Court has expressed the need to examine the international context when dealing with the threat of terrorism. Again, in the *Suresh* decision, the Court noted that: " It may have once made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid. . [T] o insist on direct proof of a specific threat to Canada as the test for "danger to the security of Canada" is to set the bar too high. There must be a real and serious possibility of adverse effect to Canada. But the threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security".

Second, our Anti-terrorism legislation reflects the imperative of concerted international action by referencing 10 out of the 12 United Nations Anti-Terrorism conventions and protocols, permitting Canada to ratify three conventions that it had signed earlier, and by implementing Security Council Resolution 1373, passed on September 28, 2001. That resolution called on member countries to take action to suppress terrorist financing, to deny safe haven to terrorists and to ensure a legal framework is in place to prosecute them. This is not to suggest that the international framework is complete. We need to work with other states to assess this framework against the threats that have emerged and to fill in any gaps.

This leads to my third point: the recent response to terrorism and the financing of terrorist activities demonstrates a fundamental shift in focus – from actions and responsibilities of the nation-state to the use of international legal measures to sanction the activities of named individuals. Thus, the UN resolutions oblige states to freeze the assets of individuals alleged to have supported and facilitated terrorist activities. We must continue to consider what this means for our international legal regime.

We have considered legal due process issues in developing the statutes establishing the ad hoc international criminal tribunals, or the International Criminal Court. But I believe we need to consider this further in our international response to the support for terrorist activities.

Prevention and information sharing

Much of the response to terrorism –from shoring up security at airports to the current debate around the merits of preemptive military action—is organized around the idea of prevention. A culture of prevention requires that we be able to sufficiently assess the risk of terrorist activity. The information base from which we are working must be continually examined. As you know, not all information and intelligence is of equal value and may have been collected for very different purposes. Varying levels of privacy may attach to the desired information. Success will depend on what is known about these threats, who knows it, when they know it and whether they have received it in a form that they can act upon. These questions may be answered differently depending on whether they arise in a regulatory, law enforcement or intelligence context. They are further complicated when we seek to transfer the information obtained in one context to another, or between one state and another.

The public naturally expects that law enforcement and national security agencies will have available to them all relevant information necessary to protect against future terrorist activity. As a result, it is not surprising that the Canada-US Smart Border Declaration contains various information-sharing provisions. At the same time, there is a genuine public concern about individual privacy. Our information-sharing regime will need to accommodate these various privacy interests and safeguard Charter rights while maintaining this culture of prevention.

Relations with minority communities

The principle of prevention also has implications for minority communities in Canada.There were widespread concerns, post-September 11th, that there would be a backlash against visible members of the Islamic community, and that the coercive power of the state would be targeted against that community. This is a truly fundamental issue. It forces us to examine in a concrete way how we are going to reconcile the need for effective anti-terrorism measures, based on values such as respect for minorities, with Canada's vision of a multicultural society founded not on common ethnic origins, but on a common objective.

Generally speaking, this is not a legal question, and the solution depends on education and greater interaction to achieve mutual understanding. It is a special responsibility of law enforcement officials, the police and Crown counsel who must go out and meet with the Islamic community. But there are issues for the legal framework as well. Good laws should reflect social values. The *Anti-terrorism Act* reflects the importance of respect for diversity by amending the *Criminal Code* and *Human Rights Act* to deal with hate-motivated behaviour, and clarifying that using the internet for hatred or discrimination is prohibited. As well, expressions of political, religious or ideological thought, belief or opinion alone do NOT come within the definition of 'terrorist activity.'

Other issues warrant reflection. For example, racial profiling forces us to make choices between privacy and equality rights.Those who are uncomfortable with racial profiling may favour law enforcement techniques that subject everyone to greater surveillance. Some say that subjecting only a small subsection of the population to intrusive law enforcement techniques risks going too far.But if those techniques affect everyone equally, others will complain that too much privacy has been sacrificed for security. To protect the constitutional value of equality may, in other words, require more people to undergo searches that limit their privacy to a certain extent, so that a minority does not have to endure even more intrusive searches.I do not pretend to know where the right balance is. I raise this issue merely to illustrate how constitutional values must be brought to bear in thinking about our response to terrorism.

How and where should the discussion occur?

If we are going to have on-going discussion about the legal framework to combat terrorism, we need to think about where and how this is going to occur. The simple answer is that it needs to occur everywhere. It needs to start on a solid foundation of civil society institutions, through media scrutiny, NGO monitoring, academic attention. In fact, it is the robustness of these institutions that may help distinguish our reaction to this modern threat from our overreactions of the past. I talked earlier about learning the lessons of the past. An important part of this discussion needs to take place in our schools, and not just when we teach constitutional law. If we are truly committed to our children learning about what it means to be citizens in a democracy, an important part of their learning should be an examination of the past reactions of advanced democracies when faced with national security threats.

Parliament is where this discussion should be centred. There was a vigorous Parliamentary process to consider the *Anti-terrorism Act* last year. It was characterized by substantive debate in both houses, numerous witnesses, mostly drawn from among those critical of the Bill, and a significant number of amendments in response to the criticisms raised. Moreover, the debate was marked by constant reference to the need to protect the rights and freedoms enshrined in our Charter. Parliament set a high standard for how to play a responsible challenge function during this process. It needs to meet that standard again as it prepares for the 3- year legislative review of the Act and consideration of the sunset provisions.

The global nature of the threat means that the discussion also must occur among states. The state-to- state discussion needs to be anchored in facts, so there is a need to improve intelligence-sharing among allies. Different nations have taken a somewhat different approach to constructing their framework of anti-terrorism laws. While common objectives are important, we should treat differentiation as a virtue and work to share best practices.

The courts

Those who see this issue primarily in terms of the impact of a security focus on civil liberties, will see the courts as the key forum for discussion. But others in our society are concerned that an over- reliance on the courts weakens the primary role of Cabinet and Parliament to take policy leadership. For Canada to find policy balance in the area of national security, there needs to be what Peter Hogg, Dean of the Osgoode Hall Law School has characterized as an active dialogue between the courts and Parliament. This dialogue is a metaphor for the relationship between these 2 institutions. It is a relationship that works best when it is characterized on both sides by respect for, and consideration of, the perspective the other side brings.

The challenge for us is not only to encourage the discussion, but to ensure that it is a balanced and informed one. The combination of the media, an independent bar, an active academic community, and a vigourous civil society will ensure that government action will be closely scrutinized, and properly criticized. But how will citizens, Parliament or the courts, judge whether proposed government actions are appropriate? As Martin Rudner has said, 'the longer term political sustainability of Canada's counter terrorism effort may be predicated on building public confidence and understanding about security and intelligence matters.'

I agree with Professor Rudner. We all need a greater understanding of the national security context, and of the threats we are facing. An informed citizenry, Parliament and judiciary increase the likelihood that our responses will be appropriate and measured. And this brings me back to the man we are remembering today, John Tait. For what John Tait believed in so passionately was debate and discussion but debate and discussion that was always infused with knowledge, balance and respect for opposing views. And most of all, John Tait recognized the critical need for a balance between security and fundamental rights and freedoms. If one man could find that balance, so must we all.

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